89-42

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1988

MANAGEMENT RECRUITERS INTERNATIONAL, INC.,

and

DAVID MARTH,
Petitioners,

vs.

DEBORAH SWENSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

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QUESTIONS PRESENTED

1. Did Congress intend to create an exception to the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* (1982), for claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1, *et seq.*, and require that all federal employment discrimination claims be litigated, even if the parties have agreed to arbitrate those claims?

2. Did Congress intend to create an exception to the Federal Arbitration Act for claims under state civil rights statutes, and require that all state employment discrimination claims be litigated, even if the parties have agreed to arbitrate those claims?

3. Does Congress partially repeal the Federal Arbitration Act whenever it provides that a new statute will not preempt existing state statutes?

4. Does the collateral-order doctrine permit the appeal of an order staying proceedings pending arbitration under Section 3 of the Federal Arbitration Act, 9 U.S.C. §3, of a claim under a state civil rights action?

5. Is a statute such as Sec. 1019 of the Judicial Improvements and Access to Justice Act, 9 U.S.C. §15, applicable to cases which are pending decision of a petition for reconsideration on the effective date of the statute?

RULE 28.1 STATEMENT

The parent company of Petitioner Management Recruiters International, Inc. is CDI Corporation, and its parent company is CDI Corp. The only affiliates of Management Recruiters International, Inc. which are not wholly owned subsidiaries of CDI Corporation or its subsidiaries are Bra-Con/X-Mation, Inc., CDI Professional Solutions Group, Inc., May-CDI, Inc., and Pacer, Inc.

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MANAGEMENT RECRUITERS INTERNATIONAL, INC.

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DAVID MARTH,
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Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

Petitioners Management Recruiters International, Inc. ("Management Recruiters") and David Marth, defendants below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on October 5, 1988, which affirmed in part and reversed in part an order of the United States District Court for the District of Minnesota. The District Court enforced a pre-existing agreement between Management Recruiters and respondent Swenson, plaintiff below, who was a managerial employee of Management Recruiters, to arbitrate all disputes arising out of the employment agreement and the relationship between the parties. The District Court stayed all of respondent's claims. These included claims under Section 363.06 of the Minnesota Human Rights Act (the "MHRA"), relating to employment discrimination, various common law claims arising out of the same alleged facts, and a state statutory claim for the opening of respondent's mail after her resignation. Plaintiff did not assert a claim under Title VII of the Civil Rights Act of 1964 ("Title VII").

On appeal, the Eighth Circuit ruled that the Federal Arbitration Act does not apply to agreements to arbitrate claims arising under either Title VII or state civil rights statutes. The Eighth Circuit held that *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), required this result. The order was affirmed as to the claims relating to respondent's mail.

The Eighth Circuit denied petitioners' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Petition for Rehearing and Suggestion of Rehearing en Banc.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit on the merits is reported at 858 F.2d 1304, and is reproduced at Appendix A1 hereto. Its opinion on the Petition for Rehearing and Motion to Dismiss is reported at 872 F.2d 264, and is reproduced at Appendix A15 hereto. The opinion of the United States District Court for the District of Minnesota is reported at 670 F. Supp. 1438, and is reproduced at Appendix A23 hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on October 5, 1988, as part of the opinion which is reproduced at Appendix A1 hereto. The orders overruling the Motion to Dismiss and the Petition for Rehearing and Suggestion of Rehearing En Banc as moot were entered on April 12, 1989 and are contained in the opinion reproduced at Appendix A15 hereto. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1) (1982).

STATUTORY PROVISIONS INVOLVED*

Federal Arbitration Act

§2, 9 U.S.C. §2
§3, 9 U.S.C. §3
§7, 9 U.S.C. §7
§9, 9 U.S.C. §9
§10, 9 U.S.C. §10
§15, 9 U.S.C. §15

Judiciary and Judicial Procedure

28 U.S.C. §1291
28 U.S.C. §1292(a) and (b)
28 U.S.C. §1332(a)
28 U.S.C. §1441(a)

Civil Rights Act of 1964

§207 42 U.S.C. §2000a-6
§708 42 U.S.C. §2000e-7
§1104 42 U.S.C. §2000h-4

Minnesota Human Rights Act

Minn. Stat. §363.06 Subd. 1-4, 5.
Minn. Stat. §363.14 Subd. 1 (a)-(b).

* The text of these provisions is reproduced in full at Appendix A30.

STATEMENT OF THE CASE

Respondent Swenson was an employee of petitioner Management Recruiters. Swenson sued Management Recruiters and Marth,[1] alleging sexual harassment by Marth, her former supervisor, in violation of the Minnesota Human Rights Act ("MHRA"), and various other statutory and common law claims.[2] She filed her action in state court, without utilizing any of the administrative proceedings provided for by the MHRA or Title VII.

Swenson and Management Recruiters were parties to an employment agreement which provided for arbitration. Management Recruiters and Marth removed the action to the District Court on the basis of diversity of citizenship, pursuant to 28 U.S.C. §§1332 and 1441. Management Recruiters then moved for a stay of proceedings pursuant to the Federal Arbitration Act, 9 U.S.C. §3. The District Court granted the motion.

Swenson appealed the order staying her MHRA claims and claims that her personal mail was opened at the office after she had resigned. Her Notice of Appeal claimed jurisdiction pursuant to 28 U.S.C. §1292(a). The Court of Appeals affirmed the stay as to the counts relating to the opening of Swenson's mail and reversed as to the MHRA claims.

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[1] Management Recruiters' parent, CDI Corporation, also sued, was subsequently dismissed from the action.

[2] Defamation, intentional infliction of emotional distress, negligent hiring and supervision, and negligence/conversion and invasion of privacy for the opening of respondent's mail.

Subsequent to the filing of the briefs, but prior to argument, this Court announced its decision in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133 (1988). Neither counsel nor the Court raised the question of jurisdiction in light of the *Gulfstream* decision until after the Court of Appeals announced its decision. Petitioners filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, based on *Gulfstream*, and a Petition for Rehearing and Suggestion of Rehearing en Banc. Respondent moved to amend her Notice of Appeal and sought to have the Notice of Appeal treated as a petition for a writ of mandamus. The Court of Appeals overruled both the Motion to Dismiss and the Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL ARBITRATION ACT IS APPLICABLE TO CLAIMS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

The issue before the Court of Appeals was whether the Federal Arbitration Act (FAA) is applicable to an action based upon a state civil rights statute, the MHRA. Although this issue is of sufficient importance by itself to merit granting a writ of certiorari,[3] the Court of Appeals created the equally important issue of whether the FAA is applicable to Title VII.

This will necessarily entail a review of the applicability of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984), to arbitration under the FAA. In *Alexander*, this Court held that an award rendered in a collective bargaining grievance arbitration did not preclude the employee from filing a Title VII action. *Barrentine* extended the rule of non-preclusion of such awards to wage claims under the Fair Labor Standards Act and concluded that "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." 450 U.S. at 737. *McDonald* extended it to actions under 42 U.S.C. §1983.

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[3] "[T]he decision of this Court of Appeals filed October 5, 1988, has caught the attention of employment practitioners throughout the country, both defense counsel and plaintiffs' counsel alike. It is a path breaking decision and . . . has enormous implications for federal-state relations . . ." Appellant's Memorandum of Law in Opposition to Appellees' Request to Vacate on Grounds of Lack of Jurisdiction and in Support of Appellant's Motion to Amend Notice of Appeal.

These decisions have recently been applied in a manner which prevents applicability of the FAA to Title VII,[4] other federal statutes, including the ADEA[5] and ERISA,[6] and the New York Human Rights Law.[7] The strong dissents in *Bird* and *Nicholson* support the position of the petitioners, and further evidence the importance of the issues presented in this petition. In holding that Swenson's MHRA claims must be stayed pending arbitration, in accordance with the FAA, notwithstanding the *Alexander* opinion, the District Court concluded "the proposition that the Supreme Court believes Congress may have intended to preclude waiver of judicial remedies provided for in state discriminations statutes . . . is clearly dictum and more important, it is against the tide of recent Supreme Court decisions confronting the arbitrability of statutory claims." 670 F. Supp. at 1441.

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[4] *Utley v. Goldman Sachs & Co.*, 49 Empl. Prec. Dec. (CCH) ¶38,701 (D. Mass. 1988), appeal pending in First Circuit, No. 89-1218; *Alford v. Dean Witter Reynolds, Inc.*, _____ F. Supp. _____ (S.D.Tex. 1989) (Westlaw 1989 WL 56058) (following *Swenson* and concluding that following *Mitsubishi* and *Shearson* would require it to overrule *Alexander*, which a district court could not do).

[5] *Steck v. Smith Barney, Harris Upham & Co.*, 661 F. Supp. 543 (D. N.J. 1987) (but holding that the FAA required arbitration of the state age discrimination claims); *Nicholson v. CPC International*, 46 Fair Empl. Prac. Cas. (BNA) ¶1019 (D. N.J. 1988), *affd.* _____ F.2d _____ (3rd Cir. 1989) (Westlaw 1989 WL 56698) (majority approving and dissent rejecting *Swenson*); *Gilmer v. Interstate/Johnson Lane Co.* (N.D. N.C., 1988), appeal pending in Fourth Circuit, No. 88-1796. But see *Pihl v. Thomson McKinnon Securities, Inc.*, 48 Fair Empl. Prac. Cas. (BNA) ¶922 (E.D. Pa. 1988) (distinguishing *Alexander*).

[6] *Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2d Cir. 1989) (majority approving and dissent rejecting *Swenson*).

[7] *DeSapio v. Josephthal and Co.*, 540 N.Y.S.2d 932 (1989).

Those decisions were *Southland Corp. v. Keating,*[8] *Dean Witter Reynolds, Inc. v. Byrd,*[9] *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.,*[10] *Shearson/American Express, Inc. v. McMahon,*[11] and *Perry v. Thomas.*[12]

The Court of Appeals found petitioners' reliance on these decisions misplaced, because "none of these cases have involved employment discrimination claims." 858 F.2d at 1306. Instead, it concluded that *Alexander, Barrentine* and *McDonald* were controlling. The Court of Appeals thus applied decisions which fashioned rules of preclusion applicable to grievance arbitration, rather than recent decisions of this Court which determined the applicability of §§3 and 4 of the FAA. In doing so, it utilized the type of approach which was most recently rejected by this Court in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989), overruling *Wilko v. Swan*, 346 U.S. 427 (1953).

Under this Court's recent decisions, there is a clear federal policy that arbitration agreements "must be 'rigorously enforce[d].' " *Perry v. Thomas*, 482 U.S. at 490, citing *Shearson* and *Mitsubishi*. The appropriate analysis was stated as follows in *Shearson*, 482 U.S. at 226-27:

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[8] 465 U.S. 1 (1984), holding that a claim under the California Franchise Investment Law was arbitrable, notwithstanding a California statute invalidating the arbitration provision.

[9] 470 U.S. 213 (1985), rejecting the "intertwining" doctrine and holding that state statutory claims were required to be arbitrated, even if they were joined with arguably non-arbitrable federal claims.

[10] 473 U.S. 614 (1985), holding that arbitration of federal anti-trust claims was required under an arbitration clause in a contract involving an international transaction.

[11] 482 U.S. 220 (1987), holding that arbitration was required of Section 10(b) claims under the Securities Exchange Act of 1934 and of RICO claims.

[12] 482 U.S. 483 (1987), holding that a claim for wages under the California Labor Law must be arbitrated, notwithstanding a California statute which invalidated arbitration agreements relating to wage collection actions.

> The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. See *id.*, at 628. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent "will be deducible from [the statute's] text or legislative history," ibid., or from an inherent conflict between arbitration and the statute's underlying purposes.

Accord Rodriguez de Quijas, 109 S. Ct. at 1921.

The Court of Appeals began its analysis of the applicability of the FAA to the MHRA by determining that the FAA was not applicable to Title VII claims. Since this conclusion was necessary for its later conclusion as to the MHRA, its validity must be considered.

This conclusion was not based on the text of Title VII. The Civil Rights Act contains no reference to the FAA. There is no limitation of claims under Title VII to a judicial forum, nor are there any anti-waiver provisions similar to those considered in *Shearson* and *Rodriguez de Quijas*. Further, there is nothing in the legislative history which suggests that the FAA is inapplicable to claims under Title VII.[13]

Instead, the Court of Appeals concluded that the FAA conflicts with the purposes of Title VII. It relied upon the *Alexander* opinion for the conclusion that:

> [I]n the passage of Title VII it was the congressional intent that arbitration is unable to pay sufficient attention to the transcendent public interest in the enforcement of Title VII. Title VII mandates the promotion of the public interest by assisting victims

[13] See discussion in Part II.

> of discrimination. The arbitration process may hinder efforts to carry this mandate.

858 F.2d at 1307.

The Court of Appeals adopted the hostile characterization of arbitration contained in *Alexander*, stating at 1306-07:

> The analysis of *Alexander* lends strong support that Congress did not intend federal judicial proceedings in discrimination cases to be preempted by employment arbitration agreements enforceable under the FAA. The Court pointed up an inherent conflict between arbitration and the underlying purposes of Title VII which evince a congressional intent to prohibit waiver of judicial forums. In *Alexander*, the Supreme Court expressly commented why arbitration is poorly suited as a forum for the final resolution of rights created by Title VII. The main problems with arbitration are the lack of expertise of arbitrators, the inferior fact finding process, and the inability of arbitration to judicially construe Title VII by reference to public law concepts. *Alexander*, 415 U.S. at 56-57 (footnote omitted).

Alexander in turn relied on the characterization of the arbitration process in *Wilko*. *Alexander*, 415 U.S. at 57-58, citing *Wilko*, 346 U.S. at 435-37.

This characterization was firmly rejected in *Rodriguez de Quijas*, 109 S. Ct. at 1920:

> The Court's characterization of the arbitration process in *Wilko* is pervaded by what Judge Jerome Frank called "the old judicial hostility to arbitration." *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (CA2 1942). That view has been steadily eroded over the years, beginning in the lower courts. See *Scherk*, 484 F.2d at 616 (Stevens, *J.*, dissenting) (citing cases). The erosion intensified in our most recent decisions upholding agreements to arbitrate federal claims raised under the Securities Exchange Act of 1934, see *Shearson/American Express, Inc. v. McMahon*,

> 482 U.S. 220, 107 S. Ct. 2332, 96 L.Ed.2d 185 (1987), under the RICO statutes, see *ibid.*, and under the antitrust laws, see *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L.Ed.2d 444 (1985). See also *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S. Ct. 1238, 1242, 84 L.Ed.2d 158 (1985) (federal arbitration statute "requires that we rigorously enforce agreements to arbitrate"); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L.Ed.2d 765 (1983) ("questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"). The shift in the Court's views on arbitration away from those adopted in *Wilko* is shown by the flat statement in *Mitsubishi*: "By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial forum." 473 U.S., at 628, 105 S. Ct., at 3354. To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.

Similarly, the decision of the Court of Appeals is far out of step with this Court's endorsement of arbitration. In large part, this results from its failure to recognize either that there was no evidence that arbitration under the FAA would be inadequate or that the major asserted inadequacies of labor arbitration are not applicable under the FAA.[14]

[14] "In *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304, 1305-07 (8th Cir. 1988), the Eighth Circuit refused to enforce an arbitration agreement with respect to Title VII claims, because it perceived that arbitration is 'poorly suited as a forum for the final resolution of rights created by Title VII,' relying on *Alexander*. Because I believe that the mistrust of arbitratal proceedings reflected in *Alexander* has been largely undercut by *Mitsubishi, Shearson*, and *de Quijas*, and the court in *Swenson* offered no other justification for its conclusion, I do not find *Swenson* persuasive." *Nicholson v. CPC International, Inc.*, Slip op. 32, n.6 (Becker, *J.*, dissenting).

First, it concluded that arbitration was inadequate on a silent record. As stated in *Rodriguez de Quijas,* 109 S. Ct. at 1921:

> Finally, in *McMahon* we stressed the strong language of the Arbitration Act, which declares as a matter of federal law that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Under that statute, the party opposing arbitration carries the burden of showing that Congress intended in a separate statute to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies inherently conflicts with the underlying purposes of that other statute. 482 U.S., at 226-227, 107 S. Ct., at 2337-2338. But as Justice Frankfurter said in dissent in *Wilko,* so it is true in this case: "There is nothing in the record before us, nor in the facts of which we can take judicial notice, to indicate that the arbitral system . . . would not afford the plaintiff the rights to which he is entitled." 346 U.S., at 439, 74 S. Ct., at 189. Petitioners have not carried their burden of showing that arbitration agreements are not enforceable under the Securities Act.

Here, Swenson has not carried her burden of showing that arbitration agreements are not enforceable under Title VII or the MHRA.[15]

Second, the inadequacies of labor-management grievance arbitration discussed in *Alexander, Barrentine,*[16] and *McDonald*[17] clearly would not exist in an arbitration between petitioners and respondent pursuant to the FAA before the American Arbitration

[15] One study has concluded that "[A]s shown by the almost one hundred sexual harassment arbitrations reported since 1958, however, arbitrators appear able to handle harassment claims." Monat and Gomez, *Sexual Harassment: The Impact of Meritor Savings Bank v. Vinson on Grievances and Arbitration Decisions,* 41 The Arbitration Journal 24 (1986), at 29.

[16] 450 U.S. at 741-45.

[17] 466 U.S. at 290-91.

Association. *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith,* 797 F.2d 1197, 1207 (3d Cir. 1986) (Adams, *J.*, dissenting in part). It would be conducted by Swenson herself, and not by a union, which may be more concerned with the interest of the majority of its members than the individual member aggrieved. There is no presumption of lack of competence of the arbitrator to determine complex legal issues, unlike a labor grievance arbitrator whose "specialized competence . . . pertains primarily to the law of the shop, not the law of the land." There is no collective-bargaining agreement to impose limitations upon the power of the arbitrator "to invoke public laws that conflict with the bargain between the parties," or to limit or prevent the arbitrator from granting the range of relief provided by statute. The arbitral procedures selected by the parties are not inadequate.[18]

[18] *Nicholson,* Slip op. 27-33 (Becker, *J.*, dissenting).

Procedural safeguards are contained in §7 of the Arbitration Act, which provides for the issuance of subpoenas, the production of documents by the witness, and punishment by contempt by the district court for disobedience of the arbitrator's subpoena. Further protections are contained in the Commercial Arbitration Rules of the American Arbitration Association, summarized in Brief of Amicus Curiae American Arbitration Association at 13-14, *Shearson:*

> The rules and procedures which govern arbitration are designed to ensure fair results. Thus, the AAA's Commercial Arbitration Rules . . . provide for neutral arbitrators (Article 12), and provide both for disqualification of an arbitrator due to "any circumstances likely to affect impartiality" (Article 19), and for peremptory challenges for any reason (Article 13). Any party may be represented by counsel (Article 22). Pre-hearing conferences and preliminary hearings may be held to arrange for the exchange of information and the production of relevant documents, and to attempt to narrow the issues and expedite the proceedings (Article 10). The Arbitrator can subpoena witnesses and documents for the hearing (Article 31; *see also* 9 U.S.C. §7), and any party has a right to offer any relevant evidence (Article 31), and to require that witnesses testify under oath (Article 27). Any party has a right to have a stenographic record of the proceeding (Article 23), and briefs may be filed (Article 35). A written award is required (Article 42), and, as a matter of practice, the award can contain an explanation of reasons if the parties so request.

This Court has affirmed and reaffirmed that statutory rights may be fully vindicated in an arbitral forum, that "arbitral tribunals are readily capable of handling the factual and legal complexities" of statutory claims, that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights," and that arbitrators may be trusted to follow the law, subject to post-award judicial scrutiny. *Shearson*, 482 U.S. at 231-33.

In *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988), the Court of Appeals applied the analytical framework of *Shearson* in determining whether an ERISA claim is subject to the FAA. In finding that it is, the *Sulit* Court applied the recent decisions of this Court in the manner which should have been done here. By eschewing the approach of the *Sulit* Court, the *Swenson* Court created a conflict as to the considerations to be applied in determining the applicability of the FAA to a statutory claim.

The decision of the Court of Appeals is erroneous for several additional reasons. The most important is that it failed to recognize that *Alexander* created a rule of non-preclusion, and not a rule of non-arbitrability. The plaintiff had already fully arbitrated his grievance and lost. The issues before this Court were whether he was precluded from litigating his Title VII claim either by election of remedies or by the finding of the arbitrator. Thus, this Court never addressed the issue whether his action should have been stayed pending arbitration, which is the only issue here.

Indeed, *Alexander* may be read as recognizing the benefits of having arbitration held prior to litigation. The Court held as follows:

> We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an

> employee to pursue fully both his remedy under the grievance-arbitration clause of the collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.

415 U.S. at 59-60. The Court continued as follows, at n.21:

> We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record.[19]

There is a substantial difference between requiring a party to arbitrate statutory claims pursuant to the FAA and holding that the party will be subject to preclusion in a subsequent or continued judicial proceeding based upon such statute. If the policies reflected in the FAA and Title VII are in tension, as the Court of Appeals concluded, an accommodation can best be achieved by compelling arbitration and then determining the preclusive effect to give the award.

As noted in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. at 222-23:

[19] This approach to the admission and weight to be given to arbitral awards was reconfirmed in *Barrentine*, 450 U.S. at 743 n.22, and in *McDonald*, 466 U.S. at 292 n.13.

We believe that the preclusive effect of arbitration proceedings is significantly less well settled than the lower court opinions might suggest, and that the consequences of this misconception has been the formulation of unnecessarily contorted procedures. We conclude that neither a stay of proceedings, nor joined proceedings, is necessary to protect the federal interest in the federal-court proceeding, and that the formulation of collateral-estoppel rules affords adequate protection to that interest.

Initially, it is far from certain that arbitration proceedings will have any preclusive effect on the litigation of nonarbitrable federal claims. . . . [A]rbitration proceedings will not necessarily have a preclusive effect on subsequent federal-court proceedings.

Significantly, *McDonald* also establishes that courts may directly and effectively protect federal interests by determining the preclusive effect to be given to an arbitration proceeding. Since preclusion doctrine comfortably plays this role, it follows that neither a stay of the arbitration proceedings, nor a refusal to compel arbitration of state claims, is *required* in order to assure that a precedent arbitration does not impede a subsequent federal-court action. The Courts of Appeals that have assumed collateral-estoppel effect must be given to arbitration proceedings have therefore sought to accomplish indirectly that which they erroneously assumed they could not do directly.

The question of what preclusive effect, if any, the arbitration proceedings might have is not yet before us, however, and we do not decide it. The collateral-estoppel effect of an arbitration proceeding is at issue only after arbitration is completed, of course, and we therefore have no need to consider now whether the analysis in *McDonald* encompasses this case. Suffice it to say that in framing preclusion rules in this context, courts shall take into account the federal interests warranting protection. As a

> result, there is no reason to require that district courts decline to compel arbitration, or manipulate the ordering of the resulting bifurcated proceedings, simply to avoid an infringement of federal interests.

Unless Swenson abandons all of her non-MHRA claims, there will still be a need to determine the preclusive effect to give to the arbitration award, at least on an issue preclusion (collateral estoppel) basis. Swenson's complaint asserts claims for intentional infliction of emotional distress and negligent hiring and supervision, based upon the same alleged acts which form the basis for her MHRA claims. The factual determinations of the arbitrator should be considered.

Arbitration of all the claims, including the MHRA claims, would serve several valuable purposes, in addition to those reflected in the FAA. The award may be acceptable to both parties, bringing an end to the litigation. If the award is given full preclusive effect, it could "preclude the need for further district court action." *Sevinor v. Merrill Lynch, Pierce, Fenner & Smith*, 807 F.2d 16, 20 (1st Cir. 1986). If not,

> [t]he arbitration could be accorded evidentiary weight in a subsequent district court action ... [citing *McDonald*] or could serve to "clarify and perhaps even simplify the remaining issues which must be litigated." *Home Life Insurance Co. v. Kaufman*, 547 F. Supp. 833, 836 (S.D.N.Y. 1982) (citing cases) .... [T]he district court could properly believe it was in the interest of both efficiency and judicial economy that the [nonarbitrable] civil RICO proceedings be stayed pending arbitration of plaintiff's [arbitrable] Rule 10b-5 counts.[20]

Clearly, the Court of Appeals should have concluded that Title VII actions may be stayed pending arbitration under the FAA.

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[20] *ibid.*, decided before *Shearson*, and citing *NPS Communications, Inc. v. Continental Group, Inc.*, 760 F.2d 463 (2d Cir. 1985) and *S.A. Mineracao Da Trindade-Samitri v. Utah International*, 745 F.2d 190 (2d Cir. 1984).

II. THE FEDERAL ARBITRATION ACT IS APPLICABLE TO STATE EMPLOYMENT DISCRIMINATION CLAIMS.

The Court of Appeals concluded "that Congress has articulated an intent through the text and legislative history of Title VII to preclude waiver of judicial remedies for violation of both federal Title VII rights and parallel state statutory rights, thereby exempting state statutes from the provision of the Federal Arbitration Act." 858 F.2d at 1309.

The text of Title VII contains no exception to the Arbitration Act. When Congress enacted Title VII in 1964, it did not specifically address the question of the arbitrability of either state claims or claims under Title VII. Instead, the Court of Appeals concluded that 42 U.S.C. §§2000e-7 and 2000h-4 demonstrate the requisite Congressional intent that the Arbitration Act was not to be applicable to state remedies for discrimination.

Those sections clearly have no applicability to the Arbitration Act. Section 2000e-7 states:

> Nothing *in this title* shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title (Emphasis added).

"This title" refers to Title VII, and cannot be extended to the Arbitration Act.

Similarly, §1104 of the Civil Rights Act of 1964, 42 U.S.C. §2000h-4, is limited by its terms to the Civil Rights Act, and cannot be read to be applicable to any other act of Congress. It provides:

> Nothing contained in any title *of this Act* shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof (Emphasis added).

Had Congress intended to provide that no federal statute would preempt state laws on discrimination, it could have done so clearly and simply. Certainly Congress was aware before its passage of the Civil Rights Act that persons subject to the requirements of state anti-discrimination statutes might argue that they were preempted by various federal statutes.[21]

The only provision in the Civil Rights Act of 1964 which contains any limitation as to federal remedies, other than the sixty day deferral provision of Section 706(c) of the Act, 42 U.S.C. §2000e-5(c), is found in §205 of the House Bill, relating to injunctive relief against discrimination in places of public accommodation. It became §207 of the Act, 42 U.S.C. §2000a-6(b), which provides in part:

> The remedies provided in this title [42 U.S.C. §§2000a-2000a-6] shall be the exclusive means of enforcing the rights based on this title . . .

Title VII contains no similar exclusive remedy provision. There is no limitation of claims to a judicial forum. There are no anti-waiver provisions similar to those found not to bar arbitration in *Shearson* and *Rodriguez de Quijas*. In fact, anti-preemption provisions can be found in the Securities Act of 1933 (15 U.S.C.

[21] For example, in 1963, this Court was called upon to rule upon whether a Colorado fair employment practices statute was preempted by the Federal Railway Labor Act or the Federal Aviation Act. *Colorado Anti-Discrimination Commission v. Continental Airlines, Inc.*, 372 U.S. 714 (1963).

§77r), in the Securities and Exchange Act of 1934 (15 U.S.C. §78bb), and in the Fair Labor Standards Act (29 U.S.C. §218(a)). Yet such anti-preemption provisions have not been interpreted as expressing a congressional intent to prohibit arbitration of federal or state securities claims or of state wage act claims. *Shearson, Rodriguez de Quijas,* and *Perry.*

Further, the claimed limitation on the Arbitration Act would constitute a partial repeal. Since we have shown that there is no express partial repeal, Swenson must show the "clear and manifest" intention of Congress to impliedly repeal the Arbitration Act. *Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 468 (1982).[22]

This has not been shown. One can explain the misapplication of §§2000e-7 and 2000h-4 only by the degree of hostility evidenced by the Court of Appeals toward arbitration.

The Court of Appeals also justified its conclusion by stating that "[t]he legislative history of Title VII evinces a congressional intent to allow individuals to pursue independently one's rights under other applicable state and federal statutes." 858 F.2d at 1308.

However, the portions of the Congressional Record to which the Court referred merely explained that Title VII was not intended to preempt state civil rights laws which are not inconsistent. *Ibid.,* n.11.[23]

There is nothing in the legislative history of the Civil Rights Act of 1964 which suggests that Congress addressed the issue of arbitration. Instead, the

[22] Quoting *Radzanower v. Touche Ross & Co.,* 426 U.S. 148, 154 (1976), which quoted *Posadas v. National City Bank,* 296 U.S. 497, 503 (1936).

[23] Indeed, petitioners provided the Court of Appeals with many more citations to the legislative history, which showed that the sections in question were directed to the issue of preemption. Brief of Appellees, pp. 14-17.

legislative history confirms that Congress was concerned only that the Civil Rights Act not be deemed to preempt then existing or future state legislation. Requiring Swenson to vindicate her MHRA rights in an arbitral forum will in no way "relieve [petitioners] from any liability, duty, penalty, or punishment" provided by the MHRA.

Nowhere in any of the cited materials is there even the hint of a suggestion that Congress intended that enactment of Title VII or Title XI would create a limitation upon the Arbitration Act, either as to claims arising under Title VII or as to claims arising under state statutes. On the contrary, in accordance with a House rule, the Committee reported the changes in existing law which would result from enactment of the bill.[24] There is no reference to any change in the Arbitration Act. Accordingly, the House Judiciary Committee, which is the only committee of either House which considered the bill, did not believe that enactment of the Civil Rights Act would change the Arbitration Act!

Finally, staying judicial proceedings pending arbitration would not destroy the effectiveness of the MHRA, nor would it in turn cause an inherent conflict with the purposes of Title VII.

The underlying purpose of Title VII is to end discrimination in employment. Section 2000e-5(b) provides the primary method for enforcement of Title VII. After meeting the deferral requirement, charges of discrimination must be filed with the EEOC, which is required to investigate the charge. Upon a finding of reasonable cause, the EEOC is to use "informal methods of conference, conciliation, and persuasion" to eliminate

[24] Legislative History of Title VII and XI of the Civil Rights Act of 1964, EEOC, at 14-17.

discrimination. The filing of a charge and the opportunity for investigation and conciliation is a condition precedent to the filing of a civil action by either the EEOC or the complaining party.

Similar methods are provided by §363.06 of the MHRA. Indeed, the *Legislative History*, 2160, found that compliance was achieved through these methods in 99% of the cases reviewed.

Affirming the judgment of the District Court in this case would in no way limit the ability of the EEOC or state and local deferral agencies to enforce their respective statutes. Indeed, the MHRA specifically envisions arbitration before litigation. Minn. Stat. §363.06 subd. 3.

The stay provision of section 3 of the Arbitration Act is only applicable to a court suit or proceeding. It has no applicability to administrative proceedings. *Bache Halsey Stewart, Inc. v. French*, 425 F. Supp. 1231, 1234 (D. D.C., 1977).

Further, the FAA is inapplicable to actions brought by the EEOC under 42 U.S.C. §2000e-5(f) or state court actions filed by the Minnesota Commissioner of Human Rights, because they would not be parties to an arbitration agreement.

Instead, the FAA would come into play only where the complainant seeks to file a court action contrary to the terms of an arbitration agreement. Requiring arbitration under these limited circumstances would in no way conflict with the inherent purposes of Title VII.

An alternative judicial forum which may insure that the arbitrator has rendered an award based upon the relevant statute is provided by the FAA itself. 9 U.S.C. §9 provides for confirmation and entry of a judgment upon an arbitration award. 9 U.S.C. §10 provides for

vacation of an award upon several grounds, including ". . . refusing to hear evidence pertinent and material to the controversy."

In *Mitsubishi*, the defendants raised a concern that the arbitrators might be unwilling to render an award based upon the federal antitrust laws. The Court responded as follows, 473 U.S., at 636-38:

> There is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism. To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. Cf. *Wilko v. Swan*, 346 U.S., at 433-434. And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.
>
> Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country." Art V(2)(b), 21 UST, at 2520; see Scherk, 417 U.S., at 519, n 14. While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them (Footnotes omitted).

If Management Recruiters and Marth receive a favorable award, Swenson would be able to challenge it in the confirmation proceedings.

Alternatively, if Swenson receives a favorable award, she could seek to have judgment entered upon it pursuant to Section 9 of the Arbitration Act. If confirmed, the judgment will be as fully enforceable ". . . as if it had been rendered in an action in the court in which it is entered." 9 U.S.C. §13.

Based on the foregoing we believe that this Court should grant the petition, so that it may decide whether to conclude, paraphrasing *Shearson*, 482 U.S. at 219:

> In sum, we find no basis for concluding that Congress intended to prevent enforcement of agreements to arbitrate state discrimination claims. Swenson may effectively vindicate her MHRA claim in an arbitral forum, and therefore there is no inherent conflict between arbitration and the purposes underlying Title VII. Moreover, nothing in Title VII's text or legislative history otherwise demonstrates congressional intent to make an exception to the Arbitration Act for state employment discrimination claims. Accordingly, Swenson, "having made the bargain to arbitrate," will be held to her bargain. Her MHRA claim is arbitrable under the terms of the Arbitration Act.

III. THE COURT OF APPEALS DID NOT HAVE JURISDICTION.

Swenson based her appeal on a claim of jurisdiction pursuant to 28 U.S.C. §1292(a).

As a result of the overruling of the *Enelow-Ettelson* doctrine in *Gulfstream*, orders staying judicial proceedings are no longer immediately appealable under §1292(a)(1). When petitioners moved to dismiss the appeal for lack of jurisdiction, Swenson sought to amend her notice of appeal, claiming appellate jurisdiction under

28 U.S.C. §1291 and the collateral-order doctrine exception to the final-judgment rule, created in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

Despite this, the Court of Appeals concluded that the arbitration agreement was illegal and against public policy, because "compulsory arbitration could serve to thwart the mandate of the principals of Title VII and the underlying state discrimination claim" and that "the stay order is immediately appealable under section §1292(a)(1) since to do otherwise is to enforce an unlawful contract." 872 F.2d, at 267. Clearly, §1292(a)(1) is inapplicable.

If the Court of Appeals was referring to §1291(a)(1),[25] then the Court has constructed a novel additional exemption to the final-judgment rule. This Court should review the "illegal contract enforcement" exception created by the Court of Appeals and determine that it should not be engrafted upon §1291(a)(1). Such a new exception is wholly unnecessary, since permissive appeal under §1292(b) is available, as is an application for a writ of mandamus, subject to the appropriate constraints on the issuance of such a writ. *Gulfstream*, 108 S. Ct. at 1143-44.

A further reason for granting review is that the Court of Appeals further justified its exercise of jurisdiction by distorting the collateral-order doctrine and creating a limitation upon the jurisdiction of district courts under §§9 and 10 of the FAA. In *Gulfstream*, at 1136-37, this Court described the current contours of the collateral-order doctrine:

> Since *Cohen*, we have had many occasions to revisit and refine the collateral-order exception to the final-judgment rule. We have articulated a three-pronged test to determine whether an order that does not finally resolve a litigation is nonetheless appealable

[25] As suggested by the reference at 268, n.6. But see reference to §1292(a)(1) at 266.

> under §2392. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 98 S. Ct. 2454, 57 L.Ed.2d 351 (1978); see also, *e.g.*, *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431, 195 S. Ct. 2757, 2761, 86 L.Ed.2d 340 (1985); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375, 101 S. Ct. 669, 674, 66 L.Ed.2d 571 (1981). First, the order must "conclusively determine the disputed question." *Coopers & Lybrand v. Livesay, supra*, 437 U.S., at 468, 98 S. Ct., at 2458. Second, the order must "resolve an important issue completely separate from the merits of the action." *Ibid.* Third and finally, the order must be "effectively unreviewable on appeal from a final judgment." *Ibid.* (footnote omitted). If the order at issue fails to satisfy any one of these requirements, it is not appealable under the collateral-order exception to Section 1291.

The order of the District Court fails to satisfy the third prong of the collateral-order test. It is not "effectively unreviewable on appeal from a final judgment." This has been the ruling of every court of appeals since *Gulfstream* which has considered the appealability of orders which granted a stay pending arbitration or compelled arbitration. *Commonwealth Insurance Co. v. Underwriters, Inc.*, 846 F.2d 196 (3d Cir. 1988); *DeFuertes v. Drexel, Burnham, Lambert, Inc.*, 855 F.2d 10 (1st Cir. 1988); *Zosky v. Boyer*, 856 F.2d 554 (3rd Cir. 1988); *Delmay v. Paine Webber*, 863 F.2d 782 (11th Cir. 1988); *Campbell v. Dominick & Dominick, Inc.*, 863 F.2d 791 (11th Cir. 1988); *Steele v. L.F. Rothschild & Co.*, 864 F.2d 1 (2d Cir. 1988); and *Jolley v. Paine Webber Jackson and Curtis, Inc.*, 864 F.2d 402 (5th Cir. 1989). In each of these cases, the court held that the order was not unreviewable on appeal, and therefore the third prong of the test was not met. *See also Pioneer Properties, Inc. v. Martin*, 776 F.2d 888, 891 (10th Cir. 1985); *Quinn v. CGR*, 828 F.2d 1463 (10th Cir. 1987), both decided prior to *Gulfstream*.

The circuits were divided as to whether orders denying stays or refusing to compel arbitration were appealable. The First, Second, Fifth, Seventh, and Eleventh Circuits held that such orders were not appealable.[26] The Fourth Circuit held that they were.[27]

The Court of Appeals held that the issue of arbitrability of the MHRA claims might not be reviewable on appeal, because of the possibility that the arbitration award might be confirmed by a state court, rather than a federal court which might not have jurisdiction. This is wrong for several reasons. First, the mere possibility of a prior state court review is not sufficient to invoke the collateral-order doctrine. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 11 n.11 (1983),[28] *Crotty v. City of Chicago Heights*, 857 F.2d 1170, 1173-74 (7th Cir. 1988).

Second, the Court of Appeals wrongly concluded that the jurisdiction of a district court to confirm, vacate or modify the award would be dependent upon the award exceeding the new diversity jurisdiction limit of $50,000. It is the amount "in controversy" which determines the jurisdiction, and not the amount of the award. *American Guarantee Co. v. Caldwell*, 72 F.2d 209, 211 (9th Cir. 1934). Here, Swenson has sought both economic damages "equal to three times her lost salary and fringe benefits,"

[26] *Crist v. Miller*, 846 F.2d 1143 (7th Cir. 1988); *McDonnell Douglas Finance Corp. v. Pennsylvania Power and Light Co.*, 849 F.2d 761 (2d Cir. 1988); *Administrative Management Services, Ltd., Inc. v. Royal American Managers, Inc.*, 854 F.2d 1272 (11th Cir. 1988); *Delmay v. Paine Webber, id.; Rauscher Pierce Refsnes, Inc. v. Birenbaum*, 860 F.2d 169 (5th Cir. 1988); *Queipo v. Prudential Bache Securities Co., Inc.*, 867 F.2d 721 (1st Cir. 1989).

[27] *J.J. Ryan & Sons, Inc. v. Rohne Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988); *Kansas Gas & Elec. Co. v. Westinghouse Elec. Co.*, 861 F.2d 420 (4th Cir. 1988); and *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809 (4th Cir. 1989).

[28] "We do not hold that an order becomes final merely because it may have the practical effect of allowing a state court to be the first to rule on a common issue. We hold only that a stay order is final when the sole purpose and effect of the stay is precisely to surrender jurisdiction of a federal suit to a state court."

and "compensation for lost employment opportunities," as well as "damages for mental pain and anguish, in an amount in excess of $50,000" on each of several courts. Complaint at 12-13.

Third, according to the Fifth Circuit, the district court which issued the stay order would retain jurisdiction to issue orders under §§9 and 10 of the FAA, *Jolley*, 864 F.2d at 405,[29] even where the arbitration is to be held in another district. *Purdy*, 867 F.2d at 1523.[30]

Review should be granted to resolve these conflicts as to jurisdiction and venue.

Fourth, Swenson could obtain federal review by promptly filing a §10 motion in a federal district court, whether in Ohio or Minnesota. If petitioners were to win a race to the courthouse by filing an application to confirm the award in state court, respondent could have the proceeding removed to federal court pursuant to 28 U.S.C. §§1332 and 1441, just as this action was initially removed by petitioners on the basis of diversity of citizenship. *Sears, Roebuck and Co. v. Glenwal Co.*, 325 F. Supp. 86 (S.D.N.Y. 1970), *aff'd* 442 F.2d 1350 (2d Cir. 1971); *Synergy Gas Co. v. Sasso*, 853 F.2d 59 (2d Cir. 1988).

Finally, an arbitration is a type of forum selection clause, and as such the collateral-order doctrine is inapplicable. *Lauro Lines S.R.L. v. Chasser*, 109 S. Ct. 1976 (1989).

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[29] "While an order granting a stay postpones active litigation in the district court, it contemplates that the district court will retain jurisdiction to confirm, modify, or in some cases, to renew the litigation despite the arbitration award."

[30] See also *Smiga v. Dean-Witter Reynolds*, 766 F.2d 698 (2d Cir. 1985); *Motion Picture Laboratory Technicians Local 780 v. McGregor & Werner, Inc.*, 804 F.2d 16 (2d Cir. 1986).

IV. SECTION 15 OF THE FEDERAL ARBITRATION ACT PRECLUDED THE EXERCISE OF JURISDICTION BY THE COURT OF APPEALS.

On November 19, 1988, the Judicial Improvements and Access to Justice Act, Public Law 100-702, became law. Section 1019 amended the FAA by adding a new section, 9 U.S.C. §15, which provides in part that "an appeal may not be taken from an interlocutory order . . . granting a stay of any action under section 3 of this title." 9 U.S.C. §15(b)(1).

In overruling petitioners' Motion to Dismiss, the Court of Appeals held that this section was inapplicable, because it became effective after its opinion of October 5. 872 F.2d at 265 n.1.

Several courts have held that the enactment of section 15 deprived them of jurisdiction over pending appeals. *Jolley v. Paine Webber Jackson & Curtis, Inc.*, 867 F.2d 891 (5th Cir. 1989), supplementing 864 F.2d 402; *Turboff v. Merrill Lynch, Pierce, Fenner & Smith*, 867 F.2d 1518 (5th Cir. 1989); *Purdy v. Monex International, Ltd.*, 867 F.2d 1521 (5th Cir. 1989); *Delmay v. Paine Webber*, 872 F.2d 356 (11th Cir. 1989); *Campbell v. Dominick & Dominick, Inc.*, 872 F.2d 358 (11th Cir. 1989); and *Jeske v. Brooks*, 875 F.2d 71 (4th Cir. 1989). In *Delmay* and *Campbell*, the Fifth Circuit followed the instruction of this Court in *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974), that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."

In *Bradley*, this Court made clear that such change of law would be applicable "while a case is on direct review," which is one in which the availability of appeal

has not been exhausted or lapsed, and in which the time to petition for certiorari has not passed. *Bradley,* at 710-11 n.14, citing *Linkletter v. Walker,* 381 U.S. 618, 622 n.5 (1965).

The Eighth Circuit had previously applied this rule where the change of law had occurred after it had rendered an opinion, during the pendency of a petition for rehearing with suggestion for rehearing en banc. *United States v. Wilson,* 815 F.2d 53 (8th Cir. 1987), as has the Tenth Circuit. *Southwest Forest Industries, Inc. v. Sutton,* 868 F.2d 352 (10th Cir. 1989).

The decision of the Court of Appeals is contrary to the dictates of this Court and is in conflict both with the Tenth Circuit and a prior decision of its own circuit. These are additional reasons for review, and perhaps a summary disposition of reversal.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that this Court issue a writ of certiorari in this case to review the decision of the United States Court of Appeals for the Eighth Circuit.

Dated: Cleveland, Ohio
July 10, 1989

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

(Filed October 5, 1988)

No. 87-5465

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DEBORAH J. SWENSON,
Appellant,

v.

MANAGEMENT RECRUITERS INTERNATIONAL, INC., DAVID MARTH,
Appellees,

STATE OF MINNESOTA,
amicus curiae/Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA.

Before: LAY, *Chief Judge,* BROWN,* *Senior Circuit Judge,* and BEAM, *Circuit Judge.*

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* The HONORABLE JOHN R. BROWN, Senior Circuit Judge for the United States Court of Appeals for the Fifth Circuit, sitting by designation.

LAY, *Chief Judge.*

Swenson commenced an action against her former employer, Management Recruiters International, Inc., and her former supervisor, David Marth, alleging sex discrimination, aiding and abetting race discrimination pursuant to the Minnesota Human Rights Act,[1] invasion of privacy and tortious conversion of the contents of her mail. Management Recruiters removed the case to federal court on grounds of diversity of citizenship under 28 U.S.C. §1331 (1982) and moved to stay this suit pending arbitration of all issues pursuant to the Federal Arbitration Act (FAA). 9 U.S.C. §3 (1982).[2] The district court[3] granted the motion to stay. On appeal, Swenson contends that the district court erred in finding that the FAA preempts state judicial remedies and in finding that the claims are subject to arbitration. We now reverse in part and affirm in part.

Management Recruiters International, Inc. does business in Minnesota as OfficeMates 5. Swenson was employed as an office manager at OfficeMates 5 in Edina, Minnesota, from August 12, 1985, until February 13, 1987, when she terminated her employment. She filed a discrimination suit making claims of sex discrimination and unfair employment practices in violation of Minnesota law. Swenson also alleges that Marth

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[1] Minn. Stat. §§363.01-363.14 (1986 & Supp. 1987).

[2] Swenson signed an agreement with her employer containing a provision requiring arbitration of controversies between the parties pursuant to the Commercial Arbitration Rules of the American Arbitration Association.

[3] The Honorable Donald D. Alsop, United States Chief District Judge for the District of Minnesota.

attempted to compel or coerce her to engage in racial discrimination in hiring practices, constituting an unfair employment practice in violation of Minn. Stat. §363.03 subd. 6(2) (1986).

On February 13, 1987, Swenson voluntarily quit her job allegedly because of the discriminatory actions of her employer. After Swenson quit her job, she claims that employees of Management Recruiters opened her personal, sealed mail in violation of Minn. Stat. §609.795 (1986 & Supp. 1987). After Swenson terminated her employment, she filed suit in Hennepin County District Court. The suit was removed to federal court, and the district court issued an order to stay all issues subject to arbitration. Swenson now appeals.

Preemption

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the district court had held that the employee's statutory right to a trial de novo under Title VII was foreclosed by the employee's voluntary submission of his claim to final arbitration pursuant to the union's agreement to arbitrate. The court of appeals affirmed. The Supreme Court in reversing, was "unable to accept the proposition that petitioner waived his cause of action under Title VII." *Id.* at 51. The Court unanimously declared:

> we think it clear that there can be no prospective waiver of an employee's rights under Title VII. *** Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose

> behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

Id. at 51-52. While the *Alexander* Court noted that federal policy favors arbitration, *id.* at 46, it recognized that the Title VII scheme indicates that Congress intended federal courts to be ultimately responsible for enforcing Title VII, and deferral to arbitral decisions would conflict with that goal. *Id.* at 56. The Court also observed that "the choice of forums inevitably affects the scope of the substantive right to be vindicated." *Id.* (citing *U.S. Bulk Carriers, Inc. v. Arguelles,* 400 U.S. 351, 359-60 (1971) (Harlan, J., concurring)). The *Alexander* Court concluded: "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII." 415 U.S. at 59-60.

Although *Alexander* involves a collective bargaining agreement, and not a commercial arbitration agreement under the FAA, this fact should not change the Court's analysis. The *Alexander* Court was well aware that federal policy favors arbitration. That decision turned not on the fact that a collective bargaining arbitration was involved, but instead on the unique nature of Title VII. *Alexander* noted that "Congress indicated that it considered the policy against discrimination to be of the 'highest priority.' " *Id.* at 47.

Subsequent to the *Alexander* decision, the Supreme Court again recognized that certain statutes which provide minimum substantive guarantees, such as Title VII, are to be treated differently for arbitration

purposes. In *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), the Supreme Court held that wage claims brought under the Fair Labor Standards Act are not barred by the prior submission of those claims to the contractual dispute-resolution procedures. The Court noted that "[w]hile courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, *different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.*" *Id.* at 737 (our emphasis). The *Barrentine* Court went on to state "[t]hese considerations were the basis for our decision in *Alexander v. Gardner-Denver Co.*," *Id.* (cite omitted).[4] Discrimination and civil rights legislation have traditionally been viewed differently than purely private economic disputes. R. Rotunda, J. Nowak & J. Young, Treatise on Constitutional Law: Substance and Procedure §§15.4 & 15.7 (1986).

Management Recruiters argues that the federal policy favoring arbitration should prevail. It relies on recent Supreme Court decisions in which the FAA was found to preempt both state and federal remedies.

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[4] Management Recruiters contends that *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) would appear to limit the effect of *Barrentine* and *Alexander*. The Third Circuit has rejected the proposition that *Mitsubishi* limits the effect of *Barrentine* and *Alexander*. *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987). The Third Circuit held that as long as a judicial determination of arbitrability is the result of an independent interpretation of the congressional intent, it will not contravene *Mitsubishi*. *Id.* at 850 & n.30.

However, none of these cases have involved employment discrimination claims.[5]

The analysis of *Alexander* lends strong support that Congress did not intend federal judicial proceedings in discrimination cases to be preempted by employment arbitration agreements enforceable under the FAA. The Court pointed up an inherent conflict between arbitration and the underlying purposes of Title VII which evince a congressional intent to prohibit waiver of judicial forums. In *Alexander* the Supreme Court expressly commented why arbitration is poorly suited as a forum for the final resolution of rights created by Title VII. The main problems with arbitration are the lack of

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[5]*Perry v. Thomas*, _____ U.S. _____, 107 S. Ct. 2520 (1987) (claim for wages under the California Labor Code must be arbitrated, despite California statute which invalidated arbitration agreements in wage collection cases); *Shearson/American Express, Inc. v. McMahon*, _____ U.S. _____, 107 S. Ct. 2332 (1987) (claims under §10(b) of the Securities Exchange Act and RICO claims were arbitrable under predispute arbitration agreements); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (federal anti-trust claims must be arbitrated under an arbitration agreement involving international transaction); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985) (state law claims, pendent to non-arbitrable federal securities claims, must be arbitrated; court rejected "intertwining" doctrine); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (claims asserted under California Franchise Investment Law were arbitrable, despite California law invalidating arbitration clause).

expertise of arbitrators,[6] the inferior factfinding process,[7] and the inability of arbitration to judicially construe Title VII by reference to public law concepts. *Alexander*, 415 U.S. at 56-57. *See also McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984) (lack of expertise cited as reason not to defer to arbitration in section 1983 case); *Barrentine*, 450 U.S. at 743 (lack of competence to decide legal issue cited as reason not to defer to arbitration in Fair Labor Standards Act case).

Management Recruiters argues that the Supreme Court has recently rejected the idea that the competence of arbitrators is inadequate to decide statutory claims. The Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), observed "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Id.* at 626-27. The Court rejected arguments

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[6] *Alexander* noted that many arbitrators are not lawyers, and many of them may not possess the knowledge to resolve the complex legal questions that might arise under the antidiscrimination statutes. 415 U.S. at 57 n.18. Arbitrators may be ill-equipped to handle questions of law such as the proper burden of proof or the appropriate legal standard to apply. *Id.; see also McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984).

[7] The *Alexander* Court explained:

> [t]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. *** And as this Court has recognized, "[a]rbitrators have no obligation to the court to give their reasons for an award."

415 U.S. at 57-58 (citations omitted); *see also McDonald*, 466 U.S. at 291.

of inadequacy based on complexity of the claim, inadequate procedures, and fear that arbitrators will not follow the statute and fail to protect substantive rights. *Id.* at 634-36. *See also Shearson*, _____ U.S. _____, 107 S. Ct. at 2340-44.

Arguably, *Mitsubishi* mandates that it is the intent found in the text of the statute, and not the conclusions of the court regarding the adequacy of arbitration which is determinative. However, *Mitsubishi* went on to note, "[t]hat is not to say that all controversies implicating statutory rights are suitable for arbitration. *** [I]t is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable." *Mitsubishi*, 473 U.S. at 627.

We conclude that in the passage of Title VII it was the congressional intent that arbitration is unable to pay sufficient attention to the transcendent public interest in the enforcement of Title VII. Title VII mandates the promotion of the public interest by assisting victims of discrimination. The arbitration process may hinder efforts to carry out this mandate.

State antidiscrimination laws

Having concluded that arbitration under the FAA was not intended to supersede federal judicial remedies under Title VII we turn to the discussion as to whether the same principles should apply to state remedies serving as a counterpart to Title VII.

Alexander recognized that "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander*, 415 U.S. at 48-49. Title VII contemplates

substantial involvement of state procedures in the implementation of employment discrimination claims. Title VII provides for initial consideration of claims in state and local forums, and the EEOC may not process a charge of discrimination until the state remedy has been invoked and 60 days have passed, or until state proceedings have terminated.[8] *See also* 42 U.S.C. §2000e-5(b) (1982).

Two sections of the Civil Rights Act of 1964 make clear the importance of state law and congressional intent to preempt only those laws which actually conflict with federal law. Section 2000e-7 of 42 U.S.C. provides:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

Section 2000h-4 of 42 U.S.C., which applies to all titles of the Civil Rights Act, provides the standard for preemption:

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[8] 42 U.S.C. §2000e-5(c) (1982):

> In the case of an alleged unlawful employment practice occurring in a State, *** which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated ***.

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

These sections demonstrate the central role state law is to play in the Title VII scheme.

In *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982), the Court held that in Title VII cases, federal courts are required to give res judicata effect to state court decisions in state law discrimination cases. Kremer filed an employment discrimination charge with the EEOC under Title VII. The EEOC, as mandated by Title VII,[9] referred the claim to the state agency charged with enforcing state antidiscrimination law. The state agency determined the claim to be without merit and was upheld by an administrative appeal board.[10] Kremer filed a petition with the state appellate court and the court affirmed. Subsequently, the EEOC determined that there was no reasonable cause to believe the charge was true and issued a right-to-sue notice. Kremer then filed a suit in federal court, which was dismissed on res judicata grounds.

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[9] 42 U.S.C. §2000e-5(c) (1982).

[10] In *Kremer*, the Court found that the problems with the arbitral factfinding "cannot be attributed to state administrative boards and state courts. State authorities are charged with enforcing laws, and state courts are presumed competent to interpret those laws." *Id.* at 478.

In affirming the dismissal the Supreme Court focused on the important role of state law in enforcing the Title VII scheme, as evidenced in the legislative history. The legislative history of Title VII evinces a congressional intent to allow individuals to pursue independently one's rights under other applicable state and federal statutes.[11] Provisions in the text as well as in the legislative history demonstrate an explicit, mixed federal-state scheme of Title VII and a prominent state law role.

Alexander makes clear that Congress intended the right in employment discrimination cases to have access to judicial remedies to outbalance the federal policy favoring arbitration. It is equally clear, from the text and legislative history of Title VII and from *Kremer*, that Congress intended the federal antidiscrimination system to defer to state systems where possible. Under the Minnesota Human Rights Act, the Department of Human Rights may investigate charges, Minn. Stat. §363.06 (1986), and represent victims in administrative and judicial proceedings. Minn. Stat. §§363.071-.072

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[11] Senator Hubert Humphrey, the Senate floor manager for the bill, remarked on the relationship between Title VII and existing state statutes:

> We recognized that many States already have functioning antidiscrimination programs to insure equal access to places of public accommodation and equal employment opportunity. We sought merely to guarantee that these States—and other States which may establish such programs—will be given every opportunity to employ their expertise and experience without premature interference by the Federal Government.

110 Cong. Rec. 12,725 (1964). In an interpretive memorandum, Senators Clark and Case echoed Humphrey's remarks: "Title VII specifically provides for the continued effectiveness of State and local laws and procedures for dealing with discrimination in employment" and that "[Title VII] will not override any State law or municipal ordinance which is not inconsistent." *Id.* at 7214, 7216.

(1986). By giving individuals access to the state courts, the private litigant "not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *Alexander*, 415 U.S. at 45. As the Court stated, "the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." *Id.* at 57.

We conclude that Congress has articulated an intent through the text and legislative history of Title VII to preclude waiver of judicial remedies for violation of both federal Title VII rights and parallel state statutory rights, thereby exempting state statutes from the provisions of the Federal Arbitration Act. We emphasize that we reach this holding based upon the legislative history and congressional intent manifested by Congress in passing Title VII. The intent of the state legislature in passing the Minnesota Human Rights Act, Minn. Stat. §§363.01-363.14 (1986 & Supp. 1987), is not relevant to our holding. *Cf. Steck v. Smith Barney, Harris Upham & Co.*, 661 F. Supp. 543 (D.N.J. 1987).[12]

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[12] We note a New Jersey federal district court has examined the question whether a state law Age Discrimination in Employment Act (ADEA) claim was subject to arbitration vis-a-vis a state judicial proceeding. In finding as we do that *Alexander* is still viable after *Mitsubishi* and Title VII claims in federal court preempt arbitration, the court reasoned that plaintiff's state law claims, however, did not enjoy the same protection. The court relied on *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985), which held that arbitration is necessary "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Id.* at 217. The court also relied on the statement from *Byrd* that "the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Id.* at 221 (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)).

(Footnote continued on following page.)

Swenson's claims arising out of opening of Swenson's mail are arbitrable.

Swenson appeals from the district court's stay of Counts VI and VII of her complaint pursuant to the FAA. These counts are based upon alleged acts by the defendants which took place after Swenson had terminated her employment. Swenson argues that the parties' employment agreement had ended and that an arbitrator could decide only issues which arose during the time the employment agreement was in effect.

(Footnote continued from preceding page.)

In so holding the court reasoned that an ADEA claim was parallel to a Title VII claim, citing New Jersey authority to that effect. *Steck*, 661 F. Supp. at 548. However, the court concluded that the age discrimination statute involved was state and not federal, and there was no congressional intent involved, so the FAA must be strictly enforced. *Id.*

We find that Congress, in passing Title VII as it deals with race and gender discrimination claims, manifested the intent to exempt both state and federal law from arbitration. The ADEA is not part of Title VII, and although aimed at a form of discrimination, the ADEA does not contain the same recognition of state procedural remedies as does Title VII in dealing with race and gender discrimination claims. In fact, this court has found that the ADEA is more like 42 U.S.C. §1983 than Title VII, *Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988) (Lay, C.J., dissenting) (holding that under the ADEA, unlike Title VII, a final, unreviewed, state administrative proceeding has preclusive effect in federal court). Suffice it to say there are many substantive and procedural differences in the provisions of Title VII and the ADEA. Title VII makes clear state procedures must be invoked as a prerequisite to a filing of a Title VII claim. The ADEA does not have a similar requirement. Under the ADEA, 29 U.S.C. §633(a) (1982), it is provided that "upon commencement of action under this chapter such action shall supersede any State action" whereas Title VII contains no such limitation. Compelling arbitration in race and gender discrimination cases as a preemptive forum to state enforced claims runs contra to the intended scheme Congress has provided in Title VII. The congressional scheme recognizes both the state agencies and courts having an integral role in enforcement of Title VII claims.

The duty to arbitrate is contractual. Only those issues which parties have agreed to arbitrate may be submitted to arbitration. *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163, 1165 (8th Cir. 1984) (Arbitration is a matter of contract interpretation). This court must first look to the language of the agreement to determine whether the parties intended this dispute to be arbitrated. *Id.* If the contract language is ambiguous or unclear, federal policy requires that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

The employment agreement provides for arbitration of "all controversies, claims, disputes and matters in question arising out of, or relating to, this Agreement or the breach thereof, or the relations between the parties."[13] The district court found that given the policy favoring arbitration and the breadth of the arbitration agreement, these claims arose out of Swenson's employment as a manager, and were within the parameters of the arbitration clause. *Swenson v. CDI Corp.*, 670 F. Supp. 1438, 1440 (D. Minn. 1987). We find no error in this interpretation. We affirm the district court's decision as to the arbitrability of Counts VI and VII.

Accordingly, we reverse in part and affirm in part the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[13] Manager's Employment Agreement dated August 12, 1985, Appendix at 35.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING MOTION TO DISMISS AND PETITION FOR REHEARING

(Filed April 12, 1989)

No. 87-5465

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DEBORAH J. SWENSON,
Appellant,

v.

MANAGEMENT RECRUITERS INTERNATIONAL INC.; DAVID MARTH,
Appellees,

STATE OF MINNESOTA,
amicus curiae/Appellant.

ON PETITION FOR REHEARING AND ORDER DENYING MOTION TO DISMISS FOR LACK OF JURISDICTION.

Before LAY, *Chief Judge,* ARNOLD and BEAM, *Circuit Judges.*

LAY, *Chief Judge.*

An order was issued in this case on October 5, 1988, reversing in part and affirming in part the district court's order staying all issues subject to arbitration. *Swenson v. Management Recruiters, Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988). Management Recruiters International, Inc. has filed a petition for rehearing and motion to dismiss for lack of jurisdiction pursuant to 28 U.S.C. §1292(a)(1). Deborah Swenson has amended her notice of appeal to include 28 U.S.C. §1291 as an additional basis for jurisdiction, and alternatively requests that the notice of appeal be considered an application for writ of mandamus under 28 U.S.C. §1651. This court finds jurisdiction pursuant to section 1292(a)(1) and finds the district court's order to be a final order appealable under the collateral order doctrine. We therefore deny the motion to dismiss and the petition for rehearing.[1]

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[1] On November 19, 1988, the Judicial Improvements and Access to Justice Act ("Act"), Public Law 100-702, became law. Section 1019 of the Act amended the Federal Arbitration Act by adding a new section to title 9 of the United States Code. That section provides:

> (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—
>
> (1) granting a stay of any action under section 3 of this title;
>
> (2) directing arbitration to proceed under section 4 of this title;
>
> (3) compelling arbitration under section 206 of this title; or
>
> (4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. §15.

This section appears to make orders denying a stay of proceedings pending arbitration appealable only under 28 U.S.C. §1292(b). However, this section became effective the date of enactment of the bill, and does not apply to our October, 1988, decision.

The order of the district court, from which the appeal was filed, was entered on October 7, 1987. On the main appeal the defendant did not challenge the jurisdiction of this court to hear the appeal. On March 22, 1988, the Supreme Court decided *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133 (1988). The defendant now asserts that *Gulfstream* should apply to this appeal and that this court had no jurisdiction to review the district court's refusal to stay arbitration. On the assumption that *Gulfstream* should apply to this appeal, we find that jurisdiction nonetheless existed for this court's previous review of the district court's order.

In *Gulfstream*, the Enelow-Ettelson doctrine was held to no longer be a proper basis for appellate jurisdiction under 28 U.S.C. §1292(a)(1), which allowed immediate appeal of orders granting or denying a stay of judicial proceedings to allow arbitration. However, the Court noted that section 1292(a)(1) continues "to provide appellate jurisdiction over orders that *** have the practical effect of granting or denying injunctions and have ' "serious, perhaps irreparable, consequence." ' " *Gulfstream*, 108 S. Ct. at 1142-43 (quoting *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981)); *see also Kansas Gas & Elec. Co. v. Westinghouse Elec. Corp.*, 861 F.2d 420, 422 (4th Cir. 1988). The moving party must show that the order appealed from will have serious, irreparable consequences, and can only be effectively challenged on immediate appeal. *Carson*, 450 U.S. at 84.

We find that this case is distinguishable from the multitude of cases which find that appeals from orders granting or denying a stay pending arbitration are not immediately reviewable.[2]

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which we followed in our original opinion, the Supreme Court held that a plaintiff does not waive a cause of action under title VII by voluntarily submitting the claim to arbitration under a collective bargaining agreement. The Supreme Court expressly found that arbitration is poorly suited as a forum for the final resolution of rights created by title VII. In our initial review of this case we concluded that Congress in passing title VII demonstrated the intent "that arbitration is unable to pay sufficient attention to the transcendent public interest in the enforcement of Title VII." *Swenson*, 858 F.2d at 1307. We added that "Title VII mandates the promotion of the public interest by assisting victims of discrimination. The arbitration process may hinder efforts to carry out this mandate." *Id.* This court then found that Congress did not intend federal judicial proceedings in discrimination cases to be preempted by employment contracts containing arbitration clauses.

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[2] *See, e.g., Rauscher Pierce Refsnes, Inc. v. Birenbaum*, 860 F.2d 169 (5th Cir. 1988) (stay pending arbitration denied); *Zosky v. Boyer*, 856 F.2d 554 (3d Cir. 1988) (stay granted pending arbitration); *VDA, DeFuertes v. Drexel, Burnham, Lambert, Inc.*, 855 F.2d 10 (1st Cir. 1988) (stay granted pending arbitration); *Administrative Management Servs. Ltd. v. Royal Am. Managers, Inc.*, 854 F.2d 1272 (11th Cir. 1988) (motion to compel arbitration denied); *McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co.*, 849 F.2d 761 (2d Cir. 1988) (stay pending arbitraton and motion to compel arbitration denied); *Commonwealth Ins. Co. v. Underwriters, Inc.*, 846 F.2d 196 (3d Cir. 1988) (stay granted pending arbitration); *Crist v. Miller*, 846 F.2d 1143 (7th Cir. 1988) (stay pending arbitration denied). *But see Kansas Gas & Elec. Co. v. Westinghouse Elec. Corp.*, 861 F.2d 420 (4th Cir. 1988) (order denying arbitration was appealable interlocutory order).

In our original opinion we held that any arbitration award regarding a discrimination claim could not be enforced since it would be against public policy.[3] However, whether the arbitration award is enforceable and whether it is immediately appealable may be different questions.[4] It is argued that the district court's stay of judicial proceedings pending arbitration is interlocutory and, notwithstanding the expense and inconvenience to the parties, some court (probably the state court in Ohio) could review its enforceability.

Here the question of enforceability of any arbitration award does not turn on the jurisdictional parameter of the contract. In this case, as we have written, compulsory arbitration could serve to thwart the mandate of the principles of title VII and the underlying state discrimination claim. As we previously noted in *Swenson:*

> *Alexander* noted that many arbitrators are not lawyers, and many of them may not possess the knowledge to resolve the complex legal questions that might arise under the antidiscrimination statutes. Arbitrators may be ill-equipped to handle questions of law such as the proper burden of proof or the appropriate legal standard to apply.

858 F.2d at 1306 n.6 (citations omitted).

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[3] According to the forum selection clause of the employment contract at issue the arbitration proceeding would require plaintiff, a Minnesota citizen employed in Minnesota, to submit her claim to arbitration in the State of Ohio, the domicile of the home company.

[4] *But see Kansas Gas & Elec. Co. v. Westingnouse Elec. Corp.*, 861 F.2d 420 (4th Cir. 1988) (holding that a refusal to compel arbitration was immediately reviewable, notwithstanding *Gulfstream* because "the advantages of arbitration—speed and economy—are lost forever." *Id.* at 422, (citing *Alascom, Inc. v. ITT North Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984)). Under such circumstances the court found interlocutory review was "truly needed" since the practical effect of the order would have serious, perhaps irreparable consequences.

But more importantly courts should not recognize contracts that violate law or public policy. *United Paperworkers Int'l Union v. Misco, Inc.*, 108 S. Ct. 364, 373 (1987). As the Supreme Court points up in *Misco*:

> That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.

Id.

The bottom line is that the courts should not enforce a contract that violates some explicit public policy. *Hurd v. Hodge*, 334 U.S. 24, 35 (1948). By staying plaintiff's proceedings in the federal district court pending arbitration the district court has affirmatively enforced the arbitration clause within the contract which on its face we found to violate public policy. We reject the argument that enforcement of the arbitration proceeding might be subsequently reviewable. If the award were later enforced not only would a court enforce a futile unlawful act, but we would have unwittingly engaged in a proceeding which may well frustrate plaintiff's discrimination suit. This is particularly true in this case, if plaintiff's challenge to the arbitration award would have to be pursued in the state court of Ohio.[5] The state

[5] The contract incorporates the provisions of the Federal Arbitration Act and stipulates that the arbitration award may be enforced in either the state or federal court located in the district where the award is made. However, if the arbitration award is less than $50,000, plaintiff would not then have the requisite jurisdictional amount to assert federal diversity jurisdiction in the federal district court in Ohio. *See* 28 U.S.C. §1332 (as amended by Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, §201, 102 Stat. 4642, 4646 (1988)) (effective *180 days* after the date of enactment, November 19, 1988).

court might reject plaintiff's policy arguments and enforce the award. Thus the federal district court's decision to stay the plaintiff's claim under the Minnesota Human Rights Act may indeed be "unreviewable if not appealed now," *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983), because, if the state court found that the arbitration clause was enforceable, it presumably would be res judicata in the stayed proceedings of the federal district court in Minnesota. *See* 28 U.S.C. §1738.

We have held the arbitration clause is not enforceable because it is against public policy. This policy is explicit and well defined. It can be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests." *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers*, 461 U.S. 757, 766 (1983) (citing *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

On this basis we hold that the stay order is immediately appealable under section 1292(a)(1) since to do otherwise is to enforce an unlawful contract. Consistent with our original holding, we find review of the stay order in the present case to be truly necessary since the practical effect of nonreview may have serious and perhaps irreparable consequences. *Gulfstream* at 1142-43.

Under this argument we also find that the collateral order doctrine is applicable. The district court's stay order thus would be reviewable under *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949). *Moses*, 460 U.S. 1. *Moses* found that the district court's stay pending state court resolution was also appealable under the exception to the finality rule, also known as the collateral order doctrine. *Moses*, 460 U.S. at 11-13. The Court found that the *Moses* situation fulfilled the three part *Cohen* test.

First, the order effectively refusing to adjudicate the merits presented an important issue separate from the merits. Second, once the state court determined the question of arbitrability that decision would be res judicata and the case would be entirely unreviewable in federal court. Third, the district court stay conclusively determined the question in dispute: the practical effect of the order amounted to a dismissal since the decision deferred to the state court determination.

The facts of our case also meet the three part test of *Cohen*. First, the order refusing to stay arbitration, therefore enforcing the arbitration clause within the contract presents an important issue separate from the merits. Second, by allowing arbitration pursuant to the contract, enforcement of the award may very well be before the state court of Ohio. A state court determination of the legality of the arbitration clause will render the question res judicata in federal court. Third, under these circumstances the stay conclusively determined the question in that the order effectively amounts to a dismissal if the review would take place in Ohio state court. Therefore we find under the unusual circumstances of this case the stay order to be reviewable under the collateral order doctrine.[6] The motion to dismiss the appeal for lack of jurisdiction is denied. The petition for rehearing is denied; by reason of this supplemental opinion by the panel the suggestion for rehearing en banc is rendered moot.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[6] In view of our holding that the review may be obtained under section 1291(a)(1) and under the collateral order doctrine we need not review plaintiff's alternative claim that she is entitled to review by writ of mandamus.

ORDER OF THE UNITED STATES DISTRICT COURT

(Dated October 7, 1987)

3-87 CIV 221

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

DEBORAH J. SWENSON,
Plaintiff,

v.

CDI CORPORATION, MANAGEMENT RECRUITERS INTERNATIONAL, INC., and DAVID MARTH,
Defendants.

ORDER

DONALD GOLDMAN of Cleveland, Ohio, appeared on behalf of defendants.

ROBERT STICH of Lasley, Gaughan, Stich & Angell of Minneapolis, Minnesota, appeared on behalf of defendants.

DOUGLAS HEDIN of Minneapolis, Minnesota, appeared on behalf of the plaintiff.

The above-entitled matter comes before the court upon the motion of defendant CDI Corporation ("CDI"), Management Recruiters International, Inc. ("MRI"), and David Marth, to stay proceedings pursuant to 9 U.S.C. §3.

I. BACKGROUND.

The facts material to this motion are not in dispute. Plaintiff was a managerial employee of MRI. CDI is the parent corporation of MRI. David Marth is also a managerial employee of MRI, and acted in a supervisor capacity towards the plaintiff.

Plaintiff and MRI entered into a Manager's Employment Agreement which contained the following arbitration clause:

> Except as provided in Subsection 10(b) hereof, all controversies, claims, disputes and matters in question arising out of, or relating to, this Agreement or the breach thereof, or the relations between the parties, shall be decided by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association . . . The award rendered by the arbitrator shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof, including a federal district court, pursuant to the Federal Arbitration Act.

In her complaint, plaintiff asserts seven claims for relief, three of which the plaintiff concedes are subject to arbitration. (Count III-defamation, Count IV-intentional infliction of emotional distress, and Count V-negligent hiring and supervision.) The parties disagree, however, as to the arbitrability of the remaining counts of the complaint.

II. DISCUSSION.

The Federal Arbitration Act provides that written agreements to arbitrate controversies arising out of an existing contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Several recent Supreme Court cases provide an analytical framework for determining the arbitrability of plaintiff's remaining claims for relief. Specifically, in *Mitsubishi Motors v. Soler Chrysler-Plymouth,* 473 U.S. 614 (1984), the Court stated that the "first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.[1] *Id.* at 626. Next, if the dispute involves statutory rights, the court should consider whether Congress intended "to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 628.

A. Agreement to Arbitrate.

The plaintiff argues that Counts VI (negligence/conversion) and VII (invasion of privacy) fall outside the scope of the arbitration clause because the acts giving rise to the claims occurred after the plaintiff's termination. Both claims relate to the actions of unnamed employees of CDI and MR1 who allegedly opened plaintiff's personal mail subsequent to her termination. The letters were addressed to the plaintiff and mailed to the plaintiff's former business address.

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[1] It should be noted that defendants are not requesting the court to compel arbitration pursuant to Section 4, but rather to stay the proceedings pursuant to Section 3. Notwithstanding the distinction mentioned above, the substantive determination of arbitrability is the same under Sections 3 and 4.

Whether the parties agreed to arbitrate is determined by applying "federal substantive law of arbitrability . . ." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). That body of law counsels:

> That questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone Memorial Hospital, 460 U.S. at 24-25.

Although the issue is far from being one-sided, given the presumption in favor of arbitrability, the court is satisfied that plaintiff's claims arising from the opening of the plaintiff's mail are claims that arose out of her employment as a manager and are within the parameters of the arbitration clause at issue. *See Aspero v. Shearson American Express*, 768 F.2d 106, 109 (6th Cir. 1985).

The final two claims asserted by the plaintiff, Count I-sexual discrimination in violation of the Minnesota Human Rights Act and Count II-race discrimination in violation of the Minnesota Human Rights Act, are clearly within the scope of the arbitration clause.[2]

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[2] Plaintiff's argument that because the employment contract did not expressly prohibit the defendants from discriminating against the plaintiff the parties did not intend to arbitrate this type of dispute is contrary to the case law. The Supreme Court, in several recently decided cases, has required arbitration of state and federal *statutory* claims. *See, e.g., Perry v. Thomas*, 107 S.Ct. 2520 (1987) (California Labor Code); *Southland Corp. v. Keating*, 465 U.S. 1 (1983) (California Franchise Investment Law).

B. Congressional Intent to Preclude Waiver of Judicial Remedies of Statutory Rights.

The plaintiff argues that Congress intended to preclude waiver of the judicial remedies provided for in the Minnesota Human Rights Act. In support of her argument, plaintiff relies exclusively on language in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). In *Alexander*, the Court determined that an employee does not surrender his right to litigate a Title VII action by unsuccessfully arbitrating the underlying dispute pursuant to a collective bargaining grievance procedure. The Supreme Court reasoned that "[t]he purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of the Title VII; deferral to arbitral decisions would be inconsistent with that goal." *Id.* at 56.

The Arbitration Act, like any statutory directive, may be overridden by a contrary congressional command. *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2337 (1987). The congressional command can be in the form of expressed statutory language, legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes.[3] *Id.*

Defendants argue that because plaintiff is relying on state as opposed to federal discrimination laws, it is theoretically impossible for Congress to have intended to preclude waiver of judicial remedies provided for in the Minnesota Human Rights Act. Defendants' argument is not without some judicial support. *See Steck v. Smith Barney, Harris Upham & Co., Inc.*, 661 F.Supp. 543, 548 (D.N.J. 1987). The court, however, disagrees.

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[3] Plaintiff's argument that the non-waiver provision of the state statute is sufficient to preclude waiver was recently rejected by the Supreme Court. *Keating*, 465 U.S. at 10.

It is not inconceivable that Congress, through the express language of a federal statute or the supporting legislative history, could articulate an intent to preclude waiver of judicial remedies not only for violations of federal statutory rights but also for violation of similar state statutory rights, thereby exempting these particular state statutes from the provisions of the Federal Arbitration Act. The question remains, however, whether Congress expressed such an intent when enacting the federal discrimination laws.

Plaintiff refers the court's attention to *Alexander*, where the Supreme Court states that "[m]oreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes."

Although the language provides colorable support for the proposition that the Supreme Court believes Congress may have intended to preclude waiver of judicial remedies provided for in state discrimination statutes, the proposition is clearly dictum and more important, it is against the tide of recent Supreme Court decisions confronting the arbitrability of statutory claims. *See, e.g., McMahon*, 107 S.Ct. 2332 (1987) (claims under §10(b) of the SEA and RICO are arbitrable); *Mitsubishi*, 473 U.S. 614 (1984) (claims under federal antitrust laws are arbitrable); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1984) (Court rejected doctrine of intertwining). Given the previously cited and other recently decided Supreme Court cases, the court believes that the Supreme Court would conclude that Congress did not intend to preclude waiver of judicial remedies provided for in state discrimination statutes.

Based upon the record as presently constituted, and the foregoing discussion,

IT IS ORDERED That defendants' motion to stay proceedings is granted.

IT IS FURTHER ORDERED That this action is stayed pending completion of arbitration of all issues here pending between the parties.

DATED: October 7, 1987.

/s/ DONALD D. ALSOP
Chief U. S. District Judge

FEDERAL ARBITRATION ACT
§2, 9 U.S.C. §2

§2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

July 30, 1947, c. 392, 61 Stat. 670.

§3, 9 U.S.C. §3

§3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

July 30, 1947, c. 392, 61 Stat. 670.

§7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before matters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

July 30, 1947, c. 392, 61 Stat. 672; Oct. 31, 1951, c. 655, §14, 65 Stat. 715.

§9, 9 U.S.C. §9

§9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

July 30, 1947, c. 392, 61 Stat. 672.

§10, 9 U.S.C. §10

§10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

July 30, 1947, c. 392, 61 Stat. 672.

§15, 9 U.S.C. §15

§15. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

(Added Nov. 19, 1988, P. L. 100-702, Title X, §1019(a), 102 Stat. 4671.)

JUDICIARY AND JUDICIAL PROCEDURE

28 U.S.C. §1291

§1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. §1292(a)-(b)

§1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. §1332(a)-(b)

§1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. §1441(a)

§1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictious names shall be disregarded.

CIVIL RIGHTS ACT OF 1964, §207, 42 U.S.C. §2000a-6

§2000a-6. Jurisdiction; exhaustion of other remedies; exclusiveness of remedies; assertion of rights based on other Federal or State laws and pursuit of remedies for enforcement of such rights

(a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title [Title II] and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(b) The remedies provided in this title [Title II] shall be the exclusive means of enforcing the rights based on this title, but nothing in this title [Title II] shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title [Title II], including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

(July 2, 1964, P. L. 88-352, Title II, §207, 78 Stat. 245.)

§708, 42 U.S.C. §2000e-7

§2000e-7. Effect on State laws

Nothing in this title [Title VII] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a

State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title [Title VII].

(July 2, 1964, P. L. 88-352, Title VII, §708, 78 Stat. 262.)

§1104, 42 U.S.C. §2000h-4

§2000h-4. State authority

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

(July 2, 1964, P. L. 88-352, Title XI, §1104, 78 Stat. 268.)

MINNESOTA HUMAN RIGHTS ACT

Minn. Stat. §363.06, Subd. 1-4, 5

363.06. Grievances

Subdivision 1. Actions. Any person aggrieved by a violation of this chapter may bring a civil action as provided in section 363.14, subdivision 1, clause (a), or may file a verified charge with the commissioner or the commissioner's designated agent. A charge filed with the commissioner must be in writing on a form provided by the commissioner and signed by the charging party. The charge must state the name of the person alleged to have committed an unfair discriminatory practice, and set out a summary of the details of the practice complained of. The commissioner may require a charging party to provide the address of the person alleged to have committed the unfair discriminatory practice, names of witnesses, documents, and any other information necessary to process the charge. The commissioner may dismiss a charge when the charging party fails to provide required information. The commissioner within ten days of the filing shall serve a copy of the charge and a form for use in responding to the charge upon the respondent personally or by mail. The respondent shall file with the department a written response to the charge within 20 days of receipt of the charge.

Subd. 2. Charge, issuance by commissioner. Whenever the commissioner has reason to believe that a person is engaging in an unfair discriminatory practice, the commissioner may issue a charge stating in statutory language an alleged violation of a particular section of section 363.03.

Subd. 3. Time for filing claim. A claim of an unfair discriminatory practice must be brought as a civil action pursuant to section 363.14, subdivision 1, clause (a), filed in a charge with a local commission pursuant to section 363.116, or filed in a charge with the commissioner within 300 days after the occurrence of the practice. The running of the 300 day limitation period is suspended during the time a potential charging party and respondent are voluntarily engaged in a dispute resolution process involving a claim of unlawful discrimination under chapter 363, including arbitration, conciliation, mediation or grievance procedures pursuant to a collective bargaining agreement or statutory, charter, or ordinance provisions for a civil service or other employment system. A potential respondent who participates in such a process with a potential charging party before a charge is filed or a civil action is brought shall notify the department and the charging party in writing of the participation in the process and the date the process commenced, and shall also notify the department and the charging party of the ending date of the process. A respondent who fails to provide this notification is barred from raising the defense that the statute of limitations has run unless the 300 days plus a period of time equal to the suspension period has passed.

Subd. 4. Inquiry into charge. (1) Consistent with clause (7), the commissioner shall promptly inquire into the truth of the allegations of the charge. The commissioner shall make an immediate inquiry when a charge alleges actual or threatened physical violence. The commissioner shall also make an immediate inquiry when it appears that a charge is frivolous or without merit and shall dismiss those charges.

The commissioner shall give priority to investigating and processing those charges, in the order below, which the commissioner determines have the following characteristics:

(a) there is evidence of irreparable harm if immediate action is not taken;

(b) there is evidence that the respondent has intentionally engaged in a reprisal;

(c) a significant number of recent charges have been filed against the respondent;

(d) the respondent is a government entity;

(e) there is potential for broadly promoting the policies of this chapter; or

(f) the charge is supported by substantial and credible documentation, witnesses, or other evidence.

The commissioner shall inform charging parties of these priorities and shall tell each party if their charge is a priority case or not.

On other charges the commissioner shall make a determination within 12 months after the charge was filed as to whether or not there is probable cause to credit the allegation of unfair discriminatory practices, and

(2) If the commissioner determines after investigation that no probable cause exists to credit the allegations of the unfair discriminatory practice, the commissioner shall, within ten days of the determination, serve upon the charging party and respondent written notice of the determination. Within ten days after receipt of notice, the charging party may request in writing, on forms prepared by the department, that the

commissioner reconsider the determination. The request shall contain a brief statement of the reasons for and new evidence in support of the request for reconsideration. At the time of submission of the request to the commissioner, the charging party shall deliver or mail to the respondent a copy of the request for reconsideration. The commissioner shall either reaffirm or reverse the determination of no probable cause within 20 days after receipt of the request for reconsideration, and shall within ten days notify in writing the charging party and respondent of the decision to reaffirm or reverse.

A decision by the commissioner that no probable cause exists to credit the allegations of an unfair discriminatory practice shall not be appealed to the court of appeals pursuant to section 363.072 or sections 14.63 to 14.68.

(3) If the commissioner determines after investigation that probable cause exists to credit the allegations of unfair discriminatory practices, the commissioner shall serve on the respondent and the respondent's attorney if the respondent is represented by counsel, by first class mail, a notice setting forth a short plain written statement of the alleged facts which support the finding of probable cause and an enumeration of the provisions of law allegedly violated. If the commissioner determines that attempts to eliminate the alleged unfair practices through conciliation pursuant to subdivision 5 have been or would be unsuccessful or unproductive, the commissioner shall issue a complaint and serve on the respondent, by registered or certified mail, a written notice of hearing together with a copy of the complaint, requiring the respondent to answer the allegations of the complaint at

a hearing before an administrative law judge at a time and place specified in the notice, not less than ten days after service of said complaint. A copy of the notice shall be furnished to the charging party and the attorney general.

(4) If, at any time after the filing of a charge, the commissioner has reason to believe that a respondent has engaged in any unfair discriminatory practice, the commissioner may file a petition in the district court in a county in which the subject of the complaint occurs, or in a county in which a respondent resides or transacts business, seeking appropriate temporary relief against the respondent, pending final determination of proceedings under this chapter, including an order or decree restraining the respondent from doing or procuring an act tending to render ineffectual an order the commissioner may enter with respect to the complaint. The court shall have power to grant temporary relief or a restraining order as it deems just and proper, but no relief or order extending beyond ten days shall be granted except by consent of the respondent or after hearing upon notice to the respondent and a finding by the court that there is reasonable cause to believe that the respondent has engaged in a discriminatory practice. Except as modified by this section, the Minnesota rules of civil procedure shall apply to an application, and the district court shall have authority to grant or deny the relief sought on conditions as it deems just and equitable. All hearings under this section shall be given precedence as nearly as practicable over all other pending civil actions.

(5) If a lessor, after engaging in a discriminatory practice defined in section 363.03, subdivision 2, clause (1)(a), leases or rents a dwelling unit to a person who has

no knowledge of the practice or of the existence of a charge with respect to the practice, the lessor shall be liable for actual damages sustained by a person by reason of a final order as provided in this section requiring the person to be evicted from the dwelling unit.

(6) In any complaint issued under this section, the commissioner may seek relief for a class of individuals affected by an unfair discriminatory practice occurring on or after a date 300 days prior to the filing of the charge from which the complaint originates.

(7) The commissioner may adopt policies to determine which charges are processed and the order in which charges are processed based on their particular social or legal significance, administrative convenience, difficulty of resolution, or other standard consistent with the provisions of this chapter.

(8) The chief administrative law judge shall adopt policies to provide sanctions for intentional and frivolous delay caused by any charging party or respondent in an investigation, hearing, or any other aspect of proceedings before the department under this chapter.

* * * * *

Subd. 5. Attempts to eliminate unfair practices. The commissioner, in complying with subdivision 4, shall endeavor to eliminate the unfair discriminatory practice through education, conference, conciliation and persuasion at the place where the practice occurred, or the respondent resides or has a principal place of business.

Minn. Stat. §363.14, Subd. 1(a)-(b)

§363.14. Court actions, suits by private parties, intervention, district court jurisdiction, attorney's fees, and costs

Subdivision 1. Court actions, suits by private parties, intervention. A person may bring a civil action seeking redress for an unfair discriminatory practice:

(a) Directly to district court; or

(b) Notwithstanding the provisions of any law to the contrary, (1) within 45 days after the commissioner has dismissed a charge because it is frivolous or without merit, because the charging party has failed to provide required information, because the commissioner has determined that further use of department resources is not warranted, or because the commissioner has determined that there is no probable cause to credit the allegations contained in a charge filed with the commissioner; (2) within 45 days after the commissioner has reaffirmed a determination of no probable cause if the charging party requested a reconsideration of the probable cause determination; or (3) after 45 days from the filing of a charge pursuant to section 363.06, subdivision 1 if a hearing has not been held pursuant to section 363.071 or if the commissioner has not entered into a conciliation agreement to which the charging party is a signator. The charging party shall notify the commissioner of an intention to bring a civil action, which shall be commenced within 90 days of giving the notice;

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No. 89-42

IN THE

Supreme Court of the United States

October Term, 1988

MANAGEMENT RECRUITERS INTERNATIONAL, INC.,

and

DAVID MARTH,
Petitioners,

vs.

DEBORAH SWENSON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

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QUESTIONS

1. Does the Federal Arbitration Act pre-empt judicial remedies provided in state anti-discrimination legislation?

2. Did the Court of Appeals properly exercise jurisdiction under the collateral order doctrine in this unique case where the Petitioner did not question jurisdiction until after receiving the adverse ruling of the Appeals Court?

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STATEMENT OF THE CASE

This is not a Title VII action.

Deborah Swenson was employed to manage a personnel-placement or employment agency of Management Recruiters in Bloomington, Minnesota, a

suburb of Minneapolis. At the time she started work, she signed an individual employment contract containing an arbitration clause. This provision required that arbitration of controversies arising out of her employment take place in Cleveland, Ohio, pursuant to the Commercial Arbitration Rules of the American Arbitration Association. Thus, by the terms of the parties' arbitration agreement, she must arbitrate any claims in Cleveland, a city 740 miles from her home in Bloomington.

In March 1987, Deborah Swenson commenced a multi-count suit against her former employer and David Marth, her former supervisor, in Hennepin County District Court, Minneapolis, Minnesota. She alleged two violations of the Minnesota Human Rights Act, as well as five tort claims.

After removing the case to Federal District Court on grounds of diversity, Management Recruiters and Marth successfully moved for a stay of the entire proceedings pursuant to the Federal Arbitration Act. An appeal was timely taken.

After the Court of Appeals for the Eighth Circuit reversed the District Court, Management Recruiters and Marth moved to dismiss the appeal on grounds on lack of subject matter jurisdiction, citing *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S.Ct. 1133 (1988). On several grounds, among others the bizarre procedural posture of the case, the Court of Appeals denied this motion.

THE WRIT SHOULD NOT BE GRANTED

I. The Federal Arbitration Act does not pre-empt judicial remedies provided in state anti-discrimination legislation.

Once again, the reach—or grasp—of the Federal Arbitration Act is before this Court. Today the question is whether the FAA pre-empts judicial remedies provided in state anti-discrimination statutes. Amazingly, given the torrent of litigation under Title VII of the Civil Rights Act of 1964 and companion state civil rights statutes during the last quarter-century, this question has never been presented to this Court, and only recently been addressed by two federal appeals courts, which appear to be taking divergent paths to its resolution.

The determination of federal pre-emption of judicial remedies provided in state civil rights acts requires an excursion into the oft-quoted legislative history of Title VII. *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 280 (1987). Put another way, it requires the examination of the text and legislative history of one federal statute (Title VII) to determine Congress' views on the pre-emption of companion state legislation (Minnesota Human Rights Act) by still another federal act (FAA). The language and legislative history of Title VII provide only the means or mechanism for deciding the question of FAA pre-emption.

In phrasing the questions raised in their Petition for a Writ of Certiorari, the Petitioners have confused the issue of FAA pre-emption with the means of deciding that question. The threshold question decided by the Eighth Circuit, and now sought to be brought before this Court, is not whether Congress intended to create some

"exception" to the FAA for claims arising under Title VII, but rather whether the FAA pre-empts the judicial remedies provided in state human rights acts.

The Petitioners' confusion is shared by some courts and commentators. *Alford v. Dean Witter Reynolds, Inc.*, 712 F.Supp. 547 (S.D.Tex. 1989) interprets the present action as arising under Title VII. It does not. Larson, *Employment Discrimination*, §9.40, shares this erroneous interpretation of the present case. In *Nicholson v. CPC International, Inc.*, _____ F.2d _____ (3rd Cir. 1989), the present action was cited by a divided appeals panel when holding that FAA does not require arbitration of claims arising under the federal Age Discrimination In Employment Act, but does require arbitration of a pendent age discrimination claim arising under a New Jersey anti-discrimination statute. *Nicholson*—to the extent that it approves FAA pre-emption of judicial remedies provided in a state anti-discrimination act—stands in contrast to the holding of the Eighth Circuit to the present case.

Despite the novelty and importance of this issue, and the emerging dichotomy between the circuits, this Court should not issue a Writ because Congress has spoken not once, but twice against federal pre-emption of state civil rights legislation. The 1964 Civil Rights Act contains no less than two anti-pre-emption provisions. Section 708 of Title VII (42 U.S.C. §2000e-7) and §1104 of Title XI (42 U.S.C. §2000h-4) announce Congress' unmistakable intent that state anti-discrimination legislation will not be pre-empted unless it actually conflicts with federal law. In the debates preceding passage of the 1964 Civil Rights Act, Congress spoke as a veritable Greek chorus for the sanctity of state civil rights legislation. Because Congress has spoken so loudly and clearly against

federal pre-emption of state anti-discrimination legislation, this Court should deny the Writ sought by Petitioners.

The Petitioners argue that the Eighth Circuit partially based its decision on a skepticism about the ability of arbitrators to decide discrimination claims, but that at least since *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), this Court has recognized the increased ability and sophistication of arbitrators. While it is true that the Eighth Circuit took some volleys at arbitrators, its rather jaundiced views must be read in light of the unique facts of the present case. The arbitration provision in the employment contract between Deborah Swenson and Management Recruiters required that arbitration of controversies arising out of her employment take place in Cleveland, Ohio, pursuant to the Commercial Arbitration Rules of the American Arbitration Association. Deborah Swenson was employed to manage a personnel-placement or employment agency in Bloomington, Minnesota, a suburb of Minneapolis. By the terms of the parties' arbitration agreement, she must arbitrate her claims in Cleveland, a city 740 miles away. Moreover, Petitioners conceded below that the American Arbitration Association does not assign only lawyers to serve as arbitrators in commercial disputes. It was the specter of a Cleveland florist or baker or liquor store owner deciding complex cases under the Minnesota Human Rights Act that led the Eighth Circuit to state that arbitration was a less desirable means of adjudication than the judicial remedies required by state legislation. In actuality the basis for its holding that the FAA does not pre-empt judicial remedies under the Minnesota Human Rights Act was the letter and history of Title VII, and this Court's holding in *Alexander v. Gardner-Denver, Co.*, 415 U.S. 36 (1974).

II. The Circuit Court properly exercised jurisdiction.

The jurisdictional issue raised by the Petitioners—whether the collateral-order doctrine permits the appeal of a stay order under the FAA of a suit arising under a state civil rights action—is indeed important, but this is not the time for this Court to address it. It will be recalled that the Petitioners questioned jurisdiction only after they received the adverse decision of the Court of Appeals. These circumstances are too suspect and too unique, if not bizarre, to warrant this Court's review of the Circuit Court's jurisdictional holding.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Dated: Minneapolis, Minnesota
August 10, 1989

Respectfully submitted,

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